Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor

HIGH COURT (KUALA LUMPUR) — KOD NO D4–22–662–1990
SITI NORMA YAAKOB J
19 MARCH 1992

Banking *— Banking regulation — Acquisition of interest in shares of financial institution — Plaintiffs agreed to purchase shares of company which owned shares in financial institution — Whether approval from minister was required — Whether agreement void — Whether agreement could be saved — Banking and Financial Institutions Act 1989 ss 2(1), 45(1)(a), (b), 103(b) & 125 — Companies Act 1965 ss 6A(2), (4)(c), (6)(a), (10)(a), 134 & 135*

Words and Phrases *— 'Interest in a share' — Banking and Financial Institutions Act 1989 s 2(1)*

Kesang Corp Bhd ('Kesang') owned 17.5% of the share capital of KCB Finance Bhd ('KCB'). The plaintiffs agreed by contract to purchase from the first defendants 7.8m shares in Kesang ('the contract'). The plaintiffs and the first defendants both applied to Bank Negara for the Minister of Finance to approve the contract under s 45(1) of the Banking and Financial Institutions Act 1989 ('the Act'). Bank Negara dismissed both applications and consequently the first defendants repudiated the contract. The plaintiffs claimed damages for breach of the contract, firstly, on the ground that ministerial approval under s 45(1) of the Act was only mandatory in direct acquisitions of not less than 5% of the shares in a licensed institution. The plaintiffs therefore contended that since Kesang was not a licensed institution, ministerial approval was not necessary. The plaintiffs also argued that even if the Minister's approval were required, s 45(1) of the Act did not render the contract void because s 125 of the Act saved the contract. Section 125 of the Act states, inter alia, that 'except as otherwise provided' in the Act, no contract shall be void solely by reason of contravention of any provision of the Act.

Held, dismissing the claim:

(1) Under s 2(1) of the Act, 'interest in a share' has the same meaning as that provided by s 6A(2)–6A(10) of the Companies Act 1965.

(2) By acquiring the shares in Kesang, the plaintiffs would also be indirectly acquiring voting rights in KCB, a licensed institution. Accordingly, s 6A(6)(a) of the Companies Act 1965 which relates to direct acquisition, did not apply in this case. An indirect acquisition of an interest in a share is a recognizable mode of acquisition as is clear from the language of s 6A(10)(a) of the Companies Act 1965. The proposed contract therefore fell within s 45(1)(a) and (b) of the Act and it was mandatory for the parties to obtain the Minister's approval.

(3) The importance of s 45(1) of the Act is the obtaining of the Minister's approval, thereby giving the parties the capacity to enter into an agreement. In this case neither the plaintiffs nor the first defendants had the capacity to enter into the contract without the Minister's approval, there was no agreement which could be saved by s 125 of the Act. Since the Act did not expressly provide for an agreement entered into without the Minister's approval to be validated, the contract was therefore void and unenforceable.

(4) In any event, the granting of the Minister's approval is an administrative act which the Act has rendered mandatory for the purposes of regulating the activities of financial institutions in this country. In that respect, the obtaining of such approval is a matter of public policy which comes within the ambit of s 24(e) of the Contracts Act 1950. Accordingly, a contravention of s 45(1) of the Act is also a contravention of s 24(e) of the Contracts Act 1950. For this reason, s 125 of the Act could not come to assist the plaintiffs to save the contract.

(5) Solely on the fact that Bank Negara dismissed both applications from the plaintiffs and the first defendants for the Minister's approval, the contract was rendered void and unenforceable.

[Bahasa Malaysia summary

Kesang Corp Bhd ('Kesang') memiliki 17.5% syer modal KCB Finance Bhd ('KCB'). Plaintif bersetuju melalui kontrak untuk membeli 7.8 juta syer defendan pertama dalam Kesang ('kontrak itu'). Plaintif dan defendan pertama kedua-duanya memohon kepada Bank Negara untuk Menteri Kewangan meluluskan kontrak itu di bawah s 45(1) Akta Bank dan Institusi-Institusi Kewangan 1989 ('Akta itu'). Bank Negara menolak kedua-dua permohonan itu dan oleh kerana itu defendan pertama mengingkari kontrak itu. Plaintif menuntut ganti rugi kerana kemungkiran kontrak itu, pada pertamanya, atas alasan bahawa kelulusan Menteri di bawah s 45(1) Akta itu adalah hanya mandatori dalam pemerolehan terus tidak kurang daripada 5% syer dalam institusi yang berlesen. Plaintif oleh itu berhujah bahawa kerana Kesang bukan suatu institusi yang berlesen, kelulusan Menteri tidak perlu didapati. Plaintif juga berhujah bahawa walaupun kelulusan Menteri diperlukan, s 45(1) Akta itu tidak menjadikan kontrak itu tidak sah kerana s 125 Akta itu menyelamatkan kontrak itu. Seksyen 125 Akta itu menyatakan, antara lain, bahawa 'except as otherwise provided' di dalam Akta itu, tiada kontrak akan menjadi tidak sah semata-mata kerana pelanggaran sebarang peruntukan Akta itu.

Diputuskan, menolak tuntutan itu:

(1) Di bawah s 2(1) Akta itu, 'interest in a share' mempunyai maksud yang sama seperti yang diperuntukkan oleh s 6A(2)–6A(10) Akta Syarikat 1965.

(2) Dengan memperoleh syer dalam Kesang, plaintif akan juga dengan cara tidak langsung memperoleh hak mengundi dalam KCB,

suatu institusi yang berlesen. Oleh yang demikian, s 6A(6)(a) Akta Syarikat 1965 mengenai pemerolehan terus, tidak terpakai di dalam kes ini. Suatu pemerolehan dengan tidak langsung suatu kepentingan dalam sesuatu syer adalah cara pemerolehan yang dapat dikenal sebagaimana yang jelas daripada bahasa yang digunakan dalam s 6A(10)(a) Akta Syarikat 1965. Kontrak yang dicadangkan oleh kerana itu termasuk dalam s 45(1)(a) dan (b) Akta itu dan adalah mandatori bagi pihak-pihak untuk memperoleh kelulusan Menteri.

(3) Kepentingan s 45(1) Akta itu ialah perolehan kelulusan Menteri, dan dengan itu memberi pihak-pihak keupayaan untuk mengikat suatu perjanjian. Di dalam kes ini kerana tidak plaintif dan tidak juga defendan pertama mempunyai keupayaan untuk mengikat kontrak itu tanpa kelulusan Menteri, tidak terdapat perjanjian yang boleh diselamatkan oleh s 125 Akta itu. Kerana Akta itu tidak dengan nyata membenarkan suatu perjanjian yang diikat tanpa kelulusan Menteri untuk disahkan, kontrak itu oleh kerana itu tidak sah dan tidak boleh dikuatkuasakan.

(4) Bagaimanapun, pemberian kelulusan Menteri adalah suatu perbuatan pentadbiran yang Akta itu telah menjadikan mandatori untuk tujuan mengawal aktiviti-aktiviti institusi kewangan negara ini. Dari segi itu, memperoleh kelulusan seperti itu adalah suatu perkara polisi awam yang terjatuh dalam lingkungan s 24(e) Akta Kontrak 1950. Oleh yang demikian, pelanggaran s 45(1) Akta itu adalah juga suatu pelanggaran s 24(e) Akta Kontrak 1950. Oleh sebab ini, s 125 Akta itu tidak boleh menolong plaintif untuk menyelamatkan kontrak itu.

(5) Hanya atas fakta bahawa Bank Negara menolak kedua-dua permohonan daripada plaintif dan defendan pertama untuk kelulusan Menteri, kontrak itu telah dijadikan tidak sah dan tidak boleh dikuatkuasakan.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02–117–1992.]

Case referred to

1 *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 2(1), 45(1)(a), (b), 103(b), 125

Companies Act 1965 ss 6A(2), (4)(c), (6)(a), (10)(a), 134, 135

Contracts Act 1950 s 24(e)

R Lazar (*N Navaratnam* with him) (*Shearn Delamore & Co*) for the plaintiffs.

P Royan (*Karen Kaur* with him) (*Shook Lin & Bok*) for the defendants.

Cur Adv Vult

Siti Norma Yaakob J: Three questions of law were argued before me as preliminary issues to determine the validity of a contract dated 14 December 1989 entered into by the parties to this suit. By the contract the plaintiffs agreed to purchase from the first defendants 7.8m shares in Kesang Corp Bhd ('Kesang') which were registered in the name of the second defendants, a subsidiary of the first defendants at the price of $2.70 per share. The shares were pledged shares, the security provided for a loan granted by a consortium of lenders to one Safuan Holdings Sdn Bhd. The first defendants managed this loan transaction and acted as agents for the lenders. When Safuan Holdings defaulted in repayment of the loan, the lenders decided to realize the security by selling the shares and hence the contract entered into by the plaintiffs with the first defendants on behalf of the lenders.

The purchase price of the shares was to be made by one payment but this term of the contract was mutually varied by the parties agreeing to the appointment of a firm of solicitors, Messrs Mah-Kok & Din to act as stakeholders and that the plaintiffs would take delivery of the shares from the stakeholders in two tranches of 5m and 2.8m respectively upon payment by way of cashier's order for the two sums of $13.5m and $7.56m in respect of each tranche.

The plaintiffs had every intention to make their own profit from this transaction by reselling the same shares to a third party, Aeroway Sdn Bhd ('Aeroway'), at a price of $3.10 per share, and it was from the proceeds of this resale to Aeroway that the plaintiffs hoped to settle the amount due under its contract with the first defendants.

The second defendants delivered the first tranche of 5m shares to the stakeholders within the time stipulated and by way of payment, the stakeholders delivered two cheques of $13.5m and $7.56m to the first defendants.

The first defendants, however, never presented the two cheques for payment for they maintained that the prior written consent of the Minister of Finance, which should have been obtained under s 45(1) of the Banking and Financial Institutions Act 1989 ('the Act'), had not been so obtained. Both the plaintiffs and the first defendants then proceeded to apply to Bank Negara for the Minister's approval of the purchase and sale of the 7.8m Kesang shares but Bank Negara refused such approval on 28 February 1990. Consequently, the first defendants repudiated the contract and it is this repudiation which the plaintiffs now allege is a breach of the contract as ministerial approval is not necessary for the sale and acquisition of the Kesang shares. By this suit, the plaintiffs claim general damages for the breach as well as liquidated damages representing the loss suffered resulting from the non-performance of the plaintiffs' contract with Aeroway.

The preliminary issues for determination are posed by the following questions:

(1) Whether the purported contract dated 14 December 1989 between the plaintiffs and the defendants for the purchase of the 7.8m shares in Kesang Corporation Bhd was subject to both the plaintiffs and the defendants successfully obtaining the prior written approval of Bank

A Negara Malaysia and of the Minister of Finance pursuant to s 45 of the Act.

(2) Whether the plaintiffs' failure to successfully obtain the prior written approval of Bank Negara and/or the Minister of Finance rendered the said contract to purchase the 7.8m shares in Kesang Corp Bhd in any way void or unenforceable.

B (3) Whether the purported contract dated 14 December 1989 was in any event rendered void and unenforceable by reason of the letter dated 28 February 1990 from Bank Negara Malaysia to the defendants informing the defendants that their proposal to sell the 7.8m shares in Kesang Corp Bhd to the plaintiffs was not approved.

C Section 45 of the Act, as is applicable to the facts of this case, is reproduced as follows:

(1) Without prejudice to sections 49 and 50, and subject to section 46, no person shall enter into an agreement or arrangement to acquire or dispose D any interest in the shares of a licensed local institution by which, if the agreement or arrangement is carried out, he would —

(a) acquire, together with any interests in the shares of that institution which were then already held by him, or by him and by persons acting in concert with him; or

E (b) dispose, together with the interests in shares previously disposed by him to any single person or any persons acting in concert, to such single person or such persons acting in concert,

an aggregate interest in shares of not less than five per centum of the shares of that institution, without obtaining the prior written approval of the Minister to enter into such agreement or arrangement:

F Provided that no such approval shall be granted in respect of any acquisition or disposal which would result in a contravention of section 46.

(2) An application for approval under subsection (1) shall be made by the person intending to acquire or dispose any interest in shares referred to G therein and shall be sent to the Bank [ie Central Bank of Malaysia], whereupon the Bank shall submit such application, together with its recommendation thereon, to the Minister.

In this case Kesang owned 962,500 shares in a licensed institution known as KCB Finance Bhd ('KCB') and this holding represents 17.5% of KCB's H share capital. Thus, by the sale and acquisition of the 7.8m Kesang shares, the plaintiffs would also indirectly acquire 17.5% of KCB's share capital. Under these circumstances, does s 45(1) apply?

The plaintiffs maintain that s 45(1) does not apply as the ministerial approval is only mandatory to direct acquisitions of not less than 5% of the shares of a licensed institution. Since Kesang is not a licensed institution, I ministerial approval is not necessary. It would be otherwise if the plaintiffs purchased KCB shares directly as opposed to Kesang shares.

Under s 2(1) of the Act, 'interest in a share' has the same meaning as that provided by s 6A(2)–(10) (inclusive) of the Companies Act 1965 ('the 1965

Act'), and it also declares that the phrase includes the legal ownership of a share. A

Section 6A of the 1965 Act sets out the circumstances under which a person is regarded as having a relevant interest in a share for the purposes of Div 3A of Pt IV of the 1965 Act which relates to disclosures by substantial shareholders and ss 134 and 135 of the same Act which relate to disclosures of directors' shareholdings in a company. B

Since the plaintiffs maintain that s 45(1)(a) relates only to direct acquisitions, the meaning of the words 'interest in a share' can only be equated to s 6A(6)(a) of the 1965 Act and not to sub-s (4)(c) of the same section as contended by the defendants.

Section 45(1)(a) of the Act is silent as to whether the acquisition is to be effected directly or indirectly. To determine this, I need to look at the circumstances then present before the parties to this suit contracted to sell and purchase the Kesang shares on 14 December 1989. At that point of time, the defendants owned the 7.8m shares in Kesang and this block of shares represents 32.98% of Kesang's capital. The 962,500 shares which Kesang in turn owned in KCB represents 17.5% of KCB's capital. That being the case, Kesang exercised 17.5% of votes in KCB. By acquiring the 7.8m shares in Kesang, the plaintiffs would also be acquiring 17.5% of the voting rights in KCB. This, of course, amounts to an indirect acquisition of the voting rights in the KCB shares and, for that very reason, I consider that s 6A(6)(a) of the 1965 Act does not apply as that particular section relates to direct acquisitions. Furthermore, an indirect acquisition of an interest in a share is a recognizable mode of acquisition as is clear from the language of s 6A(10)(a) of the 1965 Act which provides that an interest in a share shall not be disregarded by reason only of its remoteness. C D E

Since the proposed dealings of the parties to this suit fall within s 45(1)(a) and (b) of the Act, it is mandatory for them to successfully obtain through the Central Bank of Malaysia the prior written approval of the Minister of Finance. To that end, I answer Question 1 in the affirmative. F

It is true that s 45 does not provide that the contravention of sub-s (1) renders the contract between the parties void and illegal, although s 103(b) of the Act makes the omission to obtain the prior written ministerial consent, an offence punishable with imprisonment not exceeding five years or with fine not exceeding $5m. G

In this respect, the plaintiffs rely on the broad principle enunciated by *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*[1] in which it was held that 'a contract the making of which is prohibited by statute expressly by implication shall be void and unenforceable unless the statute itself saves the contract'. It is the plaintiffs' contention that s 125 of the Act saves the contract. Section 125 is enacted as follows: H

> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in contravention of any provision of this Act shall be void solely by reason of such contravention. I

Section 45(1) expressly provides for the written consent of the Minister to be obtained prior to the entering into of any arrangement or agreement between any party. The importance of the section is the obtaining of the

written approval, thereby giving the intended contracting parties the capacity to enter into an agreement or arrangement. In this case, neither the plaintiffs nor the first defendants had the capacity to enter into the proposed contract as at 14 December 1989 and without the prior written approval, there is no agreement which can be saved by s 125. My conclusion is borne out by the first four words of that section: 'Except as otherwise provided.' Since the Act has not expressly provided that an agreement entered into before a written ministerial approval has been obtained, can be validated, the contract entered into by the parties to this suit is void and unenforceable.

In any event, the granting of ministerial approval is an administrative act which the Act has rendered mandatory for the purposes of regulating the activities of financial institutions in this country. In that respect, the successful obtaining of such an approval is a matter of public policy and it comes within the ambit of s 24(e) of the Contracts Act 1950. Thus, a contravention of s 45(1) of the Act is also a contravention of s 24(e) of the Contracts Act 1950 and, for that reason, the provisions of s 125 of the Act cannot come to assist the plaintiffs in declaring their contract with the first defendants to be valid and enforceable. For the reasons I have given, I answer Question 2 in the affirmative.

Section 45(1)(a) and (b) cast on both the plaintiffs and the first defendants the duty to obtain the prior written approval of the Minister. In this case, the first defendants applied for the approval on 28 December 1989 and the plaintiffs, through their solicitors, on 29 December 1989. On 28 February 1990, Bank Negara disapproved both applications and on this fact alone, the contract dated 14 December 1989 is rendered ineffective and unenforceable. I also answer Question 3 in the affirmative.

Lastly, as regards the costs of these proceedings, pursuant to the terms of the consent order dated 6 September 1991, I order that the plaintiffs pay such costs to the defendants.

Claim dismissed.

Reported by Wong Kian Kheong